

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CHRISTIAN J. MILACH	:	ORDER
	:	DTA# 806736
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1985, 1986 and	:	
1987.	:	

The Division of Taxation has moved for an order dismissing the petition, pursuant to 20 NYCRR 3000.5(b)(v) and (vi), on the grounds that petitioner has failed to timely file a request for a conciliation conference or petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the Notice of Deficiency. Petitioner has cross-motined for a prompt hearing before the Division of Tax Appeals with regard to the merits of the petition and requested that the Division of Taxation be required to serve an answer upon petitioner within a reasonable time.

FINDINGS OF FACT

Petitioner, Christian J. Milach, was president of Cold Spring Concrete Corporation during the years 1985 through 1987. The corporation eventually became insolvent and filed a petition in bankruptcy under Chapter 11. Pursuant to the terms of a performance bond, Integrity Insurance Company subsequently paid creditors for expenses incurred by Cold Spring Concrete Corp. However, the State of New York was not paid for withholding taxes which had accrued during the years at issue.

On December 21, 1988, the Division of Taxation ("Division") issued a Notice of Deficiency ("notice") and a Statement of Deficiency ("statement") to petitioner, based upon Tax Law § 685(g), asserting penalty due in the amount of \$130,312.87 for willful failure to collect and pay over withholding taxes.

The notice specified, in part, that:

"the deficiency will become an assessment subject to collection... unless you do one of the following within 90 days from the date of this notice...

1. Request a conciliation conference according to Section 170.3-a of the Tax Law,

or

2. File a petition for hearing according to Sections 1089 and 2008 of the Tax Law and the Rules of Practice and Procedure of the Tax Appeals Tribunal."

The Division submitted into evidence an affidavit of Michael J. O'Reilly, manager of the Central Processing Section of the Tax Compliance Division since March 14, 1985. Mr. O'Reilly's duties include: supervising the generation and issuance of statements and notices, asserting penalties due pursuant to section 685(g) of the Tax Law, and maintaining certified mail records of the addresses to which statements and notices have been sent. Mr. O'Reilly explained the procedure by which notices and statements are generated and issued. He concluded by declaring, " [a]fter reviewing [the evidence], I am certain that the Notice of Deficiency and Statement of Deficiency were mailed by certified mail on December 21, 1988."

Included with the motion papers was a copy of a certified mail record from the Tax Compliance Division which indicated that nine pages were mailed by certified mail to Christian Milach, 634 Bread and Cheese Hollow Road, Northport, New York (control number 539074) on December 21, 1988. This address precisely matches the addresses on both the notice and statement actually received by petitioner.

In response to the notice and statement, petitioner sent a request for a conciliation conference to the Tax Compliance Division by way of Federal Express on March 23, 1989.¹ Such request listed petitioner's address as 634 Bread and Cheese Hollow Road, Northport, New York 11768.

In his request, petitioner asserted that he was not a person required to collect taxes and

¹On the same date, petitioner sent a petition for hearing to the Division of Tax Appeals also by Federal Express. This petition was received on March 24, 1989 and referred to the Bureau of Conciliation and Mediation Services.

that the corporation had been unable to maintain a trust fund for the purpose of paying withholding taxes, due to its insolvency. Petitioner claimed that his failure to pay withholding taxes did not result from any willfulness on his own part, but from the breach of a contract by the City of New York. He also produced evidence to prove that he had satisfied the penalties imposed for the period August 1, 1985 through December 31, 1986.

The request was received by the Tax Compliance Division on March 24, 1989 and forwarded to the Bureau of Conciliation and Mediation Services ("BCMS"). BCMS subsequently dismissed the request as untimely. On July 21, 1989 the Division of Tax Appeals acknowledged receipt of a petition in response to the BCMS dismissal order and informed petitioner that it had been forwarded to the Law Bureau for preparation of an answer. The Division refused to answer the petition on the ground that it was untimely filed.

By Notice of Motion, dated May 20, 1991, the Division sought dismissal of the petition based upon failure to file a request for conference or petition for hearing within 90 days of the issuance of the Notice of Deficiency.

In his cross motion, dated June 7, 1991, petitioner admitted receiving the notice on December 24, 1988 and sending the request by express messenger on March 23, 1989.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) requires a notice of deficiency to be "mailed by certified or registered mail to the taxpayer at his last known address..." (see, Matter of Lawrence and Dory Rosen, Tax Appeals Tribunal, July 19, 1990). The Division has met its burden of proving that the notice and statement were properly mailed to petitioner's last known address on December 21, 1988. It submitted into evidence both the affidavit of Michael J. O'Reilly, which revealed the mailing procedures of the Division, and the certified mailing record dated December 21, 1988, which displayed the same address as that set forth in the petition as petitioner's address. Mr. O'Reilly examined the evidence submitted and concluded that the notice was issued to petitioner on the date claimed. In addition, in his cross motion, petitioner

admitted receiving the notice by certified mail from the Division on December 24, 1988.

B. Tax Law § 689(b) states that "[w]ithin ninety days...after the mailing of the notice of deficiency...the taxpayer may file a petition with the tax commission for a redetermination of the deficiency" (emphasis added). 20 NYCRR 3000.3(c) specifies that "[t]he petition must be filed within the time limitations prescribed by the applicable statutory sections and there can be no extension of those time limitations" (emphasis added). The regulations also provide that the request for a conciliation conference "must be filed within the time limitations prescribed by the applicable statutory sections for filing a petition for hearing in the Division of Tax Appeals, and there can be no extension of those time limitations" (20 NYCRR 4000.3[c] [emphasis added]).

The general rule for timely mailing requires physical delivery. However, in cases when the United States Postal Service is used to effect delivery, Tax Law § 691(a) provides that the date of the United States postmark stamped on the envelope shall be the date of delivery. In the case of postmarks not made by the United States Postal Service, section 691(a) applies only to the extent provided by regulation. 20 NYCRR 190.5(a)(1) states that, "where delivery is made by courier, delivery messenger or similar service, the date of receipt by the Department of Taxation and Finance will be the date of filing or paying" (emphasis added). In the case at hand, delivery was not made by way of the United States Postal Service. Rather, delivery was made via Federal Express, a private courier. Accordingly, the general rule that physical delivery is deemed to be the date of delivery applies (see, Matter of Stage Delicatessen East, Inc., Tax Appeals Tribunal, March 9, 1989).

The notice was issued to petitioner on December 21, 1988, thereby making the petition for hearing or request for a conciliation conference due by March 21, 1989. Petitioner admitted in his cross motion that he received the notice and statement within a reasonable time of their mailing, yet he did not submit a petition for hearing or request until March 24, 1989, three days after they were due. Without the timely filing of a petition for hearing or request for a conciliation conference, petitioner's challenges to the notice cannot be heard by the Division of Tax Appeals (see, e.g., Matter of Richard X. and Christel Bove, Tax Appeals Tribunal,

February 22, 1991).

C. It is noted that petitioner is not without remedy for his disputed tax assessment. Petitioner may make payment of the tax and, within two years from the date of payment, apply for a refund pursuant to Tax Law § 687(a). If petitioner's request for a refund is denied, he may then proceed with another petition requesting a hearing or conciliation conference (Tax Law § 170.3-a[a]).

Accordingly, the Division's motion to dismiss the petition is granted and petitioner's cross-motion for a prompt hearing is denied since the issue is now moot.

DATED: Troy, New York

7/19/91

ADMINISTRATIVE LAW JUDGE